Supreme Court, U.S.
FILED

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No.

In The

# *Supreme Court of the United States*

October Term, 1998

KWOK CHING YU,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,
*Respondent.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITION FOR WRIT OF CERTIORI

Linda S. Sheffield
*Attorney for Petitioner*
*Kwok Ching Yu*
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72 pp

## QUESTIONS PRESENTED

1. Whether the petitioner's constitutional right to due process of law was violated when, after the district court failed to address petitioner's Sixth Amendment claim raised in his 28 U.S.C. § 2255 petition, the district court and the Second Circuit Court of Appeals denied petitioner's request for a Certificate of Appealability.

(A) A Certificate of Appealability should have been granted as to whether the petitioner's constitutional right to effective assistance of counsel was violated when both trial and appellate counsel failed to take any steps to locate witness Tony Wong, who cooperated with the government in a prior case, and who would have testified that the government witnesses at petitioner's trial lied about their sources of heroin, which caused the petitioner to be convicted.

(B) A Certificate of Appealability should have been granted as to whether the petitioner's constitutional right to due process of law was violated by the district court's application of an erroneous legal standard, at variance with the standard applied within the Second Circuit and this Court, for determining whether petitioner's conviction should be reversed for witness perjury as to a material fact.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF CITATIONS ..... iii

OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION ..... 2

RULES AND CONSTITUTIONAL PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 10

CONCLUSION ..... 18

## TABLE OF CITATIONS

**Cases Cited:**

*Brady v. Maryland*, 373 U.S. 83 (1963) . . . . . 14

*Hohn v. United States*, 118 S.Ct.1969 (1998) . . . . . 2

*Kyles v. Whitley*, 115 S. Ct. 1555 (1995) . . . . . 14

*Rutledge v. United States* __ US __, 116 S. Ct. 1241, 1248 (1996) . . . . . 2

*Strickland v. Washington*, 466 U.S. 668 (1984) . . . . 12

*Townsend v. Sain*, 372 U.S. 293 (1963) . . . . . 16

*United States v. Bagley*, 473 U.S. 667 (1985) . . . . . 14

*United States v. Cronic*, 466 U.S. 648 (1984) . . . . . 12

*United States v. Wallach*, 935 F2d 445 (2d Cir. 1991) . . . . . 15, 16, 17

*United States v. Yu*, 101 F. 1393 (2d Cir. 1996) . . . . . 5

*United States v. Yu*, No. 93-1882 (2d Cir. September 20, 1994) . . . . . 4

Statutes Cited:

21 U.S.C. § 848 . . . . . 3

18 U.S.C. § 2 . . . . . 3

21 U.S.C. § 846 . . . . . 3

21 U.S.C. § 812 . . . . . 3

21 U.S.C. § 952 . . . . . 3

21 U.S.C. § 960(a)(1) . . . . . 3

21 U.S.C. § 960(b)(1)(A) . . . . . 3

21 U.S.C. § 963 . . . . . 3

28 U.S.C. § 1254(1) . . . . . 2

28 U.S.C. § 2255 . . . . . 2, 10, 11

**United States Constitution Cited:**

**Fifth Amendment** . . . . . 2

**Sixth Amendment** . . . . . 2, 5, 10, 12

**Rules Cited:**
**Federal Rules of Criminal Procedure:**

**Rule 33** . . . . . 4

## APPENDIX

**Appendix A - July 6, 1998, Denial of Certificate of Appealability by Second Circuit Court of Appeals . . 1a**

**Appendix B - May 6, 1998, District Court Denial of Certificate of Appealability . . . . . .4a**

**Appendix C - April 16, 1998, District Court opinion in denying relief as to 28 U.S.C.§ 2255 petition . . . . . 6a**

**Appendix D - July 25, 1996, Second Circuit affirmance of Rule 33 denial . . . . . 26a**

**Appendix E - October 25, 1995, District court's denial of Motion for New Trial (pursuant to Rule 33) . . . . . 29a**

**Appendix F - September 19, 1994, Second Circuit's affirmance of petitioner's conviction . . . . . 42a**

Petitioner Kwok Ching Yu prays that a writ of certiorari issue to grant a Certificate of Appealability allowing the petitioner to address the denial of his constitutional rights to the Second Circuit Court of Appeals.

## OPINIONS BELOW

On September 19, 1994, the Second Circuit Court of Appeals affirmed petitioner's conviction (Appendix F). On December 21, 1994, the Second Circuit denied Yu's Petition for Rehearing and Suggestion for Rehearing In Banc. On October 25, 1995, the Honorable Robert W. Sweet denied Yu's Motion for a New Trial (Rule 33) 902 F. Supp. 464 (S.D.N.Y. 1995) (Appendix E). On July 25, 1996, the Second Circuit affirmed the Rule 33 denial in a summary order (101 F. 3d 1393 (2d Cir. 1996)) (Appendix D). The U.S. District Court denied the petition for Writ of Habeas Corpus 28 U.S.C. § 2255 in an opinion dated April 6, 1998. (Appendix C) and it denied petitioner's request for a Certificate of Appealability on May 6, 1998 (Appendix B). On July 6, 1998, the United States Court of Appeals for the Second Circuit denied petitioner's request for a Certificate of Appealability (Appendix A).

## STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review denials of applications by a circuit judge or a court of appeals panel. *Hohn v. United States*, 118 S.Ct. 1969 (1998).

## RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the United States Constitution are pertinent:

Amendment V: "No person shall...be deprived of life, liberty, or property, without due process of law..."

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.

## STATEMENT OF THE CASE

On April 21, 1997, Petitioner Kwok Ching Yu moved pursuant to 28 U.S.C. § 2255 to vacate or correct his sentence. Yu prevailed solely on his claim that his dual conviction for conspiracy and participating in a continuing criminal enterprise violated the rule in *Rutledge v. United States* __ US __, 116 S. Ct. 1241, 1248 (1996). All other relief was denied. Requests to the district court and to the U.S. Court of Appeals for the Second Circuit

for a Certificate of Appealability were denied. A mandate was issued in the Second Circuit on July 16, 1998.

The petitioner's first trial commenced on April 6, 1992, in the U.S. District Court for the Southern District of New York, and concluded April 23, 1992, when a mistrial was declared after the jury reported that it was deadlocked on the third day of deliberations. A second jury trial was held, which resulted in petitioner's conviction on December 15, 1992. That trial resulted in petitioner Yu's conviction of two counts of conspiracy to import more than one kilogram of heroin, 21 U.S.C. § 846; being a principal administrator of a continuing criminal enterprise in violation of 21 U.S.C. § 963; two counts of conspiracy to distribute more than one kilogram of heroin, 21 U.S.C. § 846; being a principal administrator of a continuing criminal enterprise in violation of 21 U.S.C. § 848; two counts of importing heroin into the United States in violation of 21 U.S.C. §§ 812, 952, 960(a)(1), 960(b)(1)(A) and 18 U.S.C. § 2. On December 3, 1993, a mandatory sentence of life in prison, five years supervised release and mandatory special assessments totaling $350 was imposed.

Yu appealed his conviction on grounds including

ineffective assistance of counsel (different grounds than the § 2255 petition), insufficient evidence and prosecutorial misconduct. Following oral argument on September 19, 1994, the Second Circuit affirmed his conviction in all respects. *United States v. Yu*, No. 93-1882 (2d Cir. September 20, 1994) (Appendix F). On December 21, 1994, the Second Circuit Court of Appeals denied Yu's Petition for Rehearing and Suggestion for Rehearing In Banc (Appendix E).

On June 21, 1995, petitioner filed a motion in the U.S. District Court, to set aside the judgment and for a new trial pursuant to F.R.Cr.P. Rule 33, contending that a remark made by the prosecutor at oral argument before the Court of Appeals constituted newly discovered evidence, entitling him to a new trial. The newly discovered evidence was the government's statement that the testimony of an alleged co-conspirator, Tony Wong, would have added nothing to the evidence provided by the government at trial. According to the theory presented by Yu's then counsel, this "evidence" refuted the government's inference at trial that Wong would have supported the co-conspirator's testimony. On October 25, 1995, the Honorable Robert W. Sweet denied Yu's motion. 902 F. Supp. 464 (S. D. N. Y. 1995). Yu

appealed the denial of the Rule 33 Motion to the Second Circuit Court of Appeals. The Court affirmed by a summary order dated July 25, 1996. *United States v. Yu*, 101 F. 1393 (2d Cir. 1996).

The district court, in deciding Yu's § 2255 petition, erroneously listed the issues to be decided, leaving out the Sixth Amendment violation alleged to have affected practically all of the other issues raised. The Sixth Amendment issue was not addressed at all in Judge Sweet's lengthy opinion (6a)[1]. The government conceded (in its opposition to the request to the Second Circuit for a Certificate of Appealability) that the district court failed to address the Sixth Amendment violation.

The evidence at trial attempted to prove that from early 1988 until January 1990, Kwok Ching Yu headed an international heroin smuggling ring, which imported over 200 kilograms of heroin from Hong Kong to New York -- concealed in shipments of soy sauce -- for distribution in the New York metropolitan area, and used several sham companies both in New York and Hong Kong, to facilitate the importation of heroin and to invest the millions of

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[1]The Notation "__a" refers to the appendix to this petition.

dollars in profits generated by the organization's illicit activities. The proof included the testimony of fourteen witnesses, including three members of the enterprise, heroin recovered during the investigation, and over 200 documentary exhibits.

During the time period charged in the indictment, on four occasions, Davies Yu and Simon Lai transported heroin they claimed to be Kwok Ching Yu's from Hong Kong to New York City. To facilitate the smuggling scheme, Davies Yu, Simon Lai and co-conspirator Tony Wong established the Son Hon Won Trading Corp. ("Son Hon Won Co.") in New York, through which to import the heroin. They also opened an office in Manhattan and rented a warehouse in Queens. In Hong Kong, Simon Lai and his girlfriend, Moni Chan, rented another warehouse and incorporated the Wah Shing Trading Corp. ("Wah Shing Co."), from which to export the heroin. By the fall of 1988 the transportation network was in place. The evidence at trial against petitioner was the co-conspirator testimony of Davies Yu, David Yu and Moni Chan. Tony Wong was an individual whose name was often mentioned in the trial of petitioner; however, he was not presented as a witness by either side. Tony Wong became a government informant after he was arrested in (what has

been referred to in petitioner's trial as) the Texaco Station heroin conspiracy, involving Roberto Figueroa. Tony Wong implicated Davies Yu, who testified against Kwok Ching Yu, petitioner herein. At petitioner's trial Davies Yu claimed that those units of heroin provided to Tony Wong were supplied to him by Kwok Ching Yu, as their Hong Kong source. When Tony Wong was a government witness, under indictment himself, he signed an affidavit in which he claimed he did not know Davies Yu's sources for heroin. Tony Wong was located in 1996 by petitioner's investigator, and he agreed to be interviewed. In a 1996 interview with petitioner's counsel and investigator, Tony Wong claimed that he knew Davies Yu's heroin sources, but he did not claim to know what source supplied which of Davies Yu's heroin shipments. At petitioner's trial, Davies Yu testified that Kwok Ching Yu was his sole source of heroin in Hong Kong and that Tony Wong was the only other source of heroin (other than petitioner) in New York. According to Tony Wong, Davies Yu lied and Wong told the prosecutors that Davies Yu was not truthful about his heroin sources. Davies Yu testified at trial, on direct examination, as follows:

> ...[Q]. During the time that you were transporting heroin for the defendant, did you know anyone else in Hong Kong you

could get heroin from?

A. No.

Q. During that period of time, did you ever receive heroin from anyone other than the defendant?

A. Tony.

Q. But that was here in New York?

MR. TURNER: Objection your Honor. The question was asked and answered.

MS. MARTINEZ: Your Honor, withdrawn, and we'll take it one step at a time.

Q. During the time that you were delivering heroin for the defendant, while in Hong Kong, did you ever receive heroin from anyone other than the defendant?

A. No.

Q. During the period of time that you were transporting heroin for the defendant, did you ever receive heroin from anyone other than the defendant here in New York?

A. Tony Wong.

Tony Wong knew Davies Yu and he knew Davies Yu's sources. Tony Wong was <u>not</u> a source. Davies Yu lied when he testified that Kwok Ching Yu was his only Hong Kong source and he lied when he said Tony Wong

supplied heroin to him. According to Tony Wong, he told the government (Elizabeth Martinez, the same AUSA who elicited the information from Davies Yu at petitioner's trial) that Davies Yu had other suppliers, a fact which was never disclosed to the defendant, and was allowed to go uncorrected when Davies Yu lied about his Hong Kong and New York sources from the witness stand. Who supplied heroin to Davies Yu during what time period is critical information to answer the charges in the indictment. Critical dates are between June, 1988, to January 23, 1990. For example, on November 8, 1988, Tony Wong was arrested. On November 6, 1988, Kwok Ching Yu was traveling from Hong Kong to New York, a two day trip. Davies Yu clearly had a second source of heroin unknown to his partner Tony Wong at the time of the Texaco Station arrest. According to Tony Wong, that source was in addition to Gold Fate, Steven Mak and Little Moustache. Those suppliers have been proven in other cases to be Hong Kong heroin sources.

There is only one contradiction in the 1990 Tony Wong affidavit and in the statements he made to Ms. Clemons in 1997. In 1990, Wong said he knew Moni Chan and he denied knowing her to Petitioner's investigator; the fact that he did not know who supplied

the Texaco Station heroin in 1990 remains true today. What Tony Wong knew was that it was probably not Kwok Ching Yu, but most importantly he knew, and he told the government, that Davies Yu had other Hong Kong Heroin sources. It is of no consequence that Kwok Ching Yu may have been involved in illegal activity. The importance of Tony Wong's statement for Kwok Ching Yu, is that it shows (1) Davies Yu perjured himself at Yu's trial as to his sources in Hong Kong and New York, (2) that the government knew about it. (3) that the perjured testimony was material to a fact to be decided by the jury.

## REASONS FOR GRANTING THE WRIT

**PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN, AFTER THE DISTRICT COURT FAILED TO ADDRESS PETITIONER'S SIXTH AMENDMENT CLAIM RAISED IN HIS 28 U.S.C. § 2255 PETITION, THE DISTRICT COURT AND THE SECOND CIRCUIT COURT OF APPEALS DENIED PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY.**

A. A Certificate of Appealability should have been granted as to whether the petitioner's constitutional right to effective assistance of

counsel was violated when both trial and appellate counsel failed to take any steps to locate witness Tony Wong, who cooperated with the government in a prior case, and who would have testified that the government witnesses at petitioner's trial lied about their sources of heroin, which caused the petitioner to be convicted.

Under the Sixth Amendment Petitioner is entitled to be heard on his claim of ineffective assistance of both trial and appellate counsel. Prior opinions of the court did not address the merits of petitioner's claim that no meaningful effort was made to locate a witness who was relatively easy to locate and who was willing to be interviewed. The Sixth Amendment claim was not mentioned in any respect in Judge Sweet's opinion (6a). Petitioner established, in his 28 U.S.C. § 2255 petition, the deficient performance of both trial and appellate counsel. The information provided by Tony Wong demonstrated that counsel's failure to locate and interview Wong (or to ask the prosecution to call him) was not reasonable under the prevailing norms and that such action was not sound trial strategy. Petitioner was prejudiced by his counsel's failure to hire an investigator to locate and interview Tony

Wong, as his third attorney did, because it was only then that petitioner learned that Tony Wong knew the other Hong Kong sources of Davies Yu, that Tony Wong himself was not a New York source and that petitioner's prosecutors were aware of those facts because Tony Wong addressed those matters to the government when he was a cooperating witness. *Strickland v. Washington*, 466 U.S. 668 (1984) sets forth the standard which must be met by a petitioner to prove an ineffective assistance of counsel claim. Petitioner has met *Strickland* by demonstrating that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the verdict. *Strickland, supra*. Counsel's unprofessional error also failed to subject the prosecution's case to a meaningful adversarial testing. In *United States v. Cronic*, 466 U.S. 648 (1984), a companion case to *Strickland*, this court carved out an exception to the two-part *Strickland* test, finding that there are circumstances that are so likely to prejudice the defendant that the cost of litigating their effect cannot be justified. One of those exceptions is counsel's failure to subject the prosecution's case to a meaningful adversarial testing.

No court has analyzed the Sixth Amendment consequences of Petitioner's attorney's failure to locate, interview or call through the government this most critical witness, whose statements directly contradict the prosecution's key witness, Davies Yu. Tony Wong contradicts Davies Yu in areas material to the issue of whether or not it was petitioner or another source who supplied heroin from Hong Kong and it opens up an area of speculation as to the identity of Davies Yu's New York heroin source since, according to Tony Wong, it was not him. Petitioner remained unknown to law enforcement until he was accused by those who set up the sophisticated importation scheme, who were assisted in the transportation aspect of their operation by Tony Wong. Tony Wong does not implicate the petitioner, however the three principals of the heroin operation do so, but only after they were arrested and charged with this serious offense.

Petitioner is deserving of judicial review of his ineffective assistance of counsel claim, which has not been addressed in either a summary denial or on its merits, and this Honorable Court is urged to reverse the decisions below which have denied a Certificate of Appealability to

the petitioner.

(B) A Certificate of Appealability should have been granted as to whether the petitioner's constitutional right to due process of law was violated by the district courts application of an erroneous legal standard, at variance with the standard applied within the Second Circuit and this Court, for determining whether petitioner's conviction should be reversed for witness perjury as to a material fact.

It is a fundamental principle of law that the government is obligated to disclose to the defense exculpatory evidence relevant to the charges to be litigated. The prosecutor is responsible for gauging the effect of that evidence. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995); *United States v. Bagley*, 473 U.S. 667 (1985). According to Tony Wong, when he was cooperating in a prior case, and when he advised the government of Davies Yu's importation scheme, he told Assistant United States Attorney Elizabeth

Martinez that Davies Yu lied to the government when Yu told them that Wong was the leader of the Hong Kong importation scheme, that he (Wong) received $500,000 from Davies Yu, that Davies Yu lied to the government by providing only limited cooperation in failing to disclose to them other narcotics deals and other illegal activities. Wong even went so far as to supply Davies Yu's sources of heroin by name (Little Moustache, Gold Fate and Steven Mak), according to his interview statements, which were Davies Yu's sources during the relevant period of time in petitioner's indictment. Davies Yu took the witness stand against the petitioner and he testified that he did not know anyone else in Hong Kong from where he could obtain heroin, during the time period of petitioner's indictment, and that Tony Wong was his only other heroin source in New York.

Second Circuit law is clear that the introduction of perjured testimony into a trial requires a determination by the court of the extent to which the government was aware of the perjury. *United States v. Wallach*, 935 F2d 445 (2d Cir. 1991) sets forth two discrete standards of review that are utilized:

> 1. Where the prosecution knew or should have known of the perjury, the conviction

> must be set aside "If there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."
>
> 2. Where the government was unaware of a witness perjury, however, a new trial is warranted only if the testimony was material and "the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely have not been convicted." *Wallach, supra*, at 456.

The district court denied petitioner's request for an evidentiary hearing so that Tony Wong's representations could be tested by an adversarial examination, relying instead on an affidavit Wong executed years earlier, which contradicted one of his present statements, that he never met Moni Chan. By denying an evidentiary hearing the district court prevented relevant facts from being developed; petitioner has been denied a full and fair hearing. *Townsend v. Sain*, 372 U.S. 293 (1963). Petitioner has never had a fact hearing on the merits of all the dispositive factual issues. The issues petitioner raised surrounding the locating and interviewing of Tony Wong have not been developed factually in the record below and

the denial of the Certificate of Appealability has made it virtually impossible for the petitioner to receive a finding on the merits of all dispositive issues. The court also mistakenly determined that because in his affidavit Tony Wong said he did not know Davies Yu's source of drugs in this case that his subsequent statements as to other heroin sources in Hong Kong were contradictory. (15a-18a) Indeed, the fact that Tony Wong did not know which source suppled heroin for a particular shipment is totally different from Tony Wong's general knowledge that Davies Yu had at least three other Hong Kong heroin sources which he lied about at petitioner's trial. Another untruth testified to by Davies Yu at petitioner's trial involved his denial as to being a big gambler. According to Tony Wong, Davies Yu was a gambler who had a gambling business which is how Davies Yu and the petitioner were acquainted. It was a lie by a key witness about his gambling habits which caused the conviction to be reversed in *Wallach, supra*.

Well established law in this court and in the Second Circuit Court of Appeals has been overlooked in denying petitioner the opportunity to appeal the district court's denial of his petition for relief. Petitioner has made a showing of a substantial constitutional issue of a denial of due process of law.

## CONCLUSION

**For all the foregoing reasons, it is respectfully submitted that this court should grant Petitioner's Petition for issuance of a Writ of Certiorari.**

**Respectfully submitted,**

**LINDA S. SHEFFIELD**

**Attorney for Kwok Ching Yu**

**Dated: September 29, 1998**

# APPENDIX

**APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING MOTION FOR CERTIFICATE OF APPEALABILITY FILED JULY 6, 1998**

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

Each motion must be accompanied by a supporting affidavit
(Local Rule 27(a))

98-2370

KWOK CHING YU

v.

UNITED STATES OF AMERICA

Use short title

YU v. U.S.A.

* * *

Has consent or opposing consent

| | | |
|---|---|---|
| A. been sought? | ☐ Yes | ☒ No |
| B. been obtained | ☐ Yes | ☒ No |
| Has service been effected? | ☒ Yes | ☐ No |
| Is oral argument desired? (*Substantive motions only*) | ☐ Yes | ☒ No |

Requested return date: _____
(*See Second Circuit Rule 27(b).*)

*Appendix A*

Has argument date of appeal been set:

A. by scheduling order? ☐ Yes ☒ No

B. by firm date/argument notice? ☐ Yes ☒ No

C. If yes, enter date: _____

* * *

s/ Linda S. Sheffield
By: (*Signature of Attorney*)
Signed name must be printed beneath
LINDA S. SHEFFIELD

Kwok Ching Yu
Appearing for: (*Name of Party*)

Appellant or Petitioner: ☐ Plaintiff ☒ Defendant

* * *

*Appendix A*

**ORDER**

Hon. Ralph K. Winter, Chief Judge, Hon. Amalya L. Kearse, Hon. John M. Walker, Jr. Circuit Judges

IT IS HEREBY ORDERED that the motion be and hereby is denied.

FOR THE COURT:
GEORGE LANGE III, Clerk
by s/ Beth J. Meador,
Administrative Attorney

July 6, 1998
Date

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 6, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 2816 (RWS)

KWOK CHING YU,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

ORDER

WHEREAS, the Court, in an Opinion and Order dated April 6, 1998 (the "Opinion"), having granted in part and denied in part Kwok Ching Yu's ("YU") motion pursuant to 28 U.S.C. § 2255; and

WHEREAS, pursuant to 28 U.S.C. § 2253(c) (1) (B) the Opinion may not be appealed from unless a Certificate of Appealability is issued by this Court or, if having been denied by this Court, by a Circuit Justice, *see Lozada v. United States*, 107 F.3d 1011, 1016-17 (2d Cir. 1997); and

WHEREAS, Yu has moved this Court for a certificate of appealability for that portion of the Opinion denying Yu's section 2255 motion; and

*Appendix B*

WHEREAS, a Certificate of Appealability may be issued, pursuant to 28 U.S.C. § 2253(c)(2), only if "the applicant has made a substantial showing of the denial of a constitutional right";

NOW, IT IS HEREBY ORDERED:

The motion for a Certificate of Appealability is denied.

New York, N.Y.
May 6, 1998

s/ Robert W. Sweet
U.S.D.J.

## APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 6, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 2816 (RWS)

KWOK CHING YU,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

* * *

OPINION

Sweet, D. J.

Petitioner Kwok Ching-Yu ("Yu") has moved pursuant to 28 U.S.C. § 2255 to vacate or correct his sentence. For the reasons set forth below, Yu's claim that his dual conviction for conspiracy and participating in a Continuing Criminal Enterprise crime violated the Supreme Court rule in *Rutledge v. United States*, 116 S.Ct. 1241, 1248 (1996) is granted, and therefore the conspiracy conviction is vacated. The motion is denied in all other respects.

*Appendix C*

***Prior Proceedings***

Yu's first trial commenced on April 6, 1992, and concluded on April 23, 1992, when a mistrial was declared after the jury reported that it was deadlocked on the third day of deliberations. A second jury trial resulted in Yu's conviction on December 15, 1992. Yu was found guilty of two counts of conspiracy to import heroin into the United States in violation of 21 U.S.C. § 846; two counts of conspiracy to distribute more than one kilogram of heroin 21 U.S.C. § 963; being a principal administrator of a continuing criminal enterprise in violation of 21 U.S.C. §§ 848(a) and (b); two counts of importing heroin into the United States in violation of 21 U.S.C. §§ 812, 952, 960 (a)(1), 960 (b)(1)(A) and 18 U.S.C. § 2. Because of the large quantity of heroin involved, Yu was sentenced on December 3, 1993, to mandatory life in prison, five years of supervised release and mandatory special assessments totaling $350. *See* 21 U.S.C. § 848.

Yu appealed his conviction on grounds including ineffective assistance of trial counsel, insufficient evidence, and prosecutorial misconduct. Following oral argument on September 19, 1994, the Court of Appeals affirmed his conviction in all respects on September 20, 1994. *United States v. Yu*, No. 93-1882, at 5 (2d Cir. Sept. 20, 1994). On December 21, 1994, the Court of Appeals denied Yu's Petition for Rehearing and Suggestion for Rehearing In Banc.

On June 21, 1995, petitioner filed a motion in this Court to set aside judgment and for a new trial pursuant to Rule 33, Fed. R. Crim. P., contending that information discovered at oral argument before the Court of Appeals entitled him to a new trial. The "newly discovered evidence" on which Yu based

his motion consisted of the Government's statement at the appellate argument that the testimony of Tony Wong ("Wong"), a co-conspirator, would have added nothing to the evidence provided by the Government at trial. According to Yu, this evidence refuted the inference at trial that Wong would have supported the co-conspirator's testimony. On October 25, 1995, this Court denied the motion. *United States v. Yu,* 902 F. Supp. 464 (S.D.N.Y. 1995).

Yu subsequently appealed the denial of his Rule 33 motion to the Court of Appeals. The Court affirmed by a summary order dated July 25, 1996, "for substantially the reasons stated by the District Court." *United States v. Yu,* 101 F.3d 1393 (2d Cir. 1996).

On April 21, 1997, Yu filed the instant motion pursuant to 28 U.S.C. § 2255 raising five issues: (1) the dual conviction for conspiracy and the Continuing Criminal Enterprise ("CCE") crime violated the Supreme Court rule in *Rutledge,* 116 S.Ct. 1241 (1996); (2) the Government failed to disclose material exculpatory evidence; (3) the trial court improperly instructed the jury; (4) the prosecution conducted improper cross examination; and (5) prosecutorial misconduct during the trial summation.

***Facts***

Yu was indicted on December 4, 1990, on nine counts along with three co-conspirators: Davies Yu ("Davies"), Simon Lai ("Lai") and Moni Chan ("Chan").[1] The primary witnesses for the Government were Yu's three co-defendants, all of whom

1. Count One charged Yu and the three co-defendants with conspiracy to distribute heroin, in violation of 21 U.S.C. § 846. Count

(Cont'd)

pleaded guilty and cooperated with the Government. Through their testimony and other evidence, the Government contended that in early 1988, Yu recruited Davies and Lai to transport heroin from Hong Kong to New York City. Davies, Lai, and Yu all traveled to Hong Kong in September 1988 on the same day in order to arrange the first of four large shipments of heroin to the United States. Davies testified that in Hong Kong, Yu directed Lai and himself to take 50 units (35 kilograms) of heroin and pack them into empty soy sauce containers for shipment to New York. The defendants then returned to the United States where Davies, Lai, and Wong established the Son Hon Won Trading Corp. ("Son Hon Won Co.") in New York, through which they would import the heroin. Upon the arrival of the heroin, Davies testified that he drove the heroin in a rental car to Manhattan where he dropped it off with Yu.

Davies testified that in November of 1988, Yu gave him 30 units of heroin to deliver to Wong for distribution on the streets of New York. Wong sold 8-10 units, including two kilograms to customers who agreed to pay him at a later date. The remainder of the heroin was kept at Davies' home. On November 8, 1988, Wong and Davies met an undercover DEA agent at a Texaco gas station in Greenwich Village, to collect the money for the two kilograms previously sold and were arrested. Davies testified that Wong had told him that the two

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(Cont'd)

Two charged all defendants with conspiracy to import heroin in violation of 21 U.S.C. § 963. Count Five charged Yu with conducting a CCE of which he was the principal administrator, in violation of 21 U.S.C. §§ 846 (a) and (b). Counts Six and Eight charged them with importing heroin on two separate occasions, in violation of 21 U.S.C. § 960(b)(1)(A) and 18 U.S.C. § 2. Counts Seven and Nine charged Yu and certain of his co-defendants with distributing heroin on two separate occasions, in violation of 21 U.S.C. § 841(b)(1)(A) and 18 U.S.C. § 2.

kilograms sold at the Texaco station were from the 30 units that Yu had given him.[2] Wong was not called by the Government as a witness at trial, and the defense did not locate him for interviewing.

In February of 1989, Yu met Davies, Chan, and David Yu at a coffee shop in Hong Kong to discuss the second shipment. Yu gave them the keys to a car that contained heroin. They picked up the car, drove it to a warehouse, and loaded the 50 units (35 kilograms) of heroin into empty soy sauce containers for export. The defendants repeated this procedure in June 1989, shipping 120 units (84 kilograms) of heroin into the United States. Davies testified that both times after the heroin shipments arrived in New York City, he used a rental car to deliver the heroin to Yu. Neither of these shipments were intercepted.

Chan testified that in November of 1989, she, Davies, and Lai met Yu in Hong Kong to arrange the fourth shipment of 60 units (42 kilograms) of heroin. The DEA intercepted the heroin upon its arrival into New Jersey in January 1990, placed tracking and listening devices into the soy sauce containers and followed the heroin to the Son Hon Won Co., in Queens, where its contents were unloaded by Cam Ky-Luu and David Yu. Both men were arrested.

On November 5, 1990, Yu was arrested in Hong Kong where police found him with his passport, U.S. $17,000, and a ledger that showed fees expended for Davies' and Chan's

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2. Wong was convicted at trial in May, 1989 and thereafter cooperated with the Government. *See United States v. Figueroa,* No. 88 Cr. 859 (S.D.N.Y. 1989).

attorneys.[3] Hong Kong extradited Yu to the United States on June 7, 1991.

At trial, Yu denied any involvement with the heroin trafficking. He explained that his travel was in connection with a small video store that he owned in Chinatown, and that it was coincidence that his passport showed that he traveled to Hong Kong on the same days as Davies and Lai.

***Discussion***

**I. *Yu's Petition is Not Time Barred***

The Government contends that the instant motion is barred by the one-year limitations period. *See* 28 U.S.C. § 2255 (one-year period of limitation shall apply to a motion under this section). However, the limitations period cannot begin prior to the "date on which the judgment of conviction becomes final." *Id.* Although Congress did not define when a judgment becomes "final" for purposes of determining the limitations period, courts in this circuit have consistently held that final judgment occurs upon the exhaustion of appeals, although it is unsettled whether the 90 day period a defendant may apply for certiorari to the Supreme Court should be added to the one-year period. *See Harris v. United States,* No. 97 Civ. 1904, 1998 WL 63459, at *3 (S.D.N.Y. 1998) (questioning whether the difference in statutory language as compared with 28 U.S.C. § 2244 (d) (1), which provides that the limitations period for state conviction habeas petitions pursuant to 28 U.S.C. § 2254 "shall run from the latest of . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," is meaningful).

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3. Yu denied paying these fees at trial.

Here, after completing his direct appeal, Yu brought a Rule 33 motion for a new trial. Denial of this motion was affirmed by the Second Circuit by summary order on July 25, 1996. Yu filed the instant motion on April 21, 1997. Therefore, considering the Second Circuit affirmation of the Rule 33 motion as the final judgment date, the instant motion was filed within the one-year period, even without consideration of the 90 day certiorari application period. Accordingly, the motion is not time-barred.

**II. Rutledge *Applies Retroactively***

Subsequent to Yu's conviction, the Supreme Court decided that it is improper to convict a defendant for conspiracy to distribute controlled substances, pursuant to 21 U.S.C. § 846, and for a Continuing Criminal Enterprise ("CCE"), pursuant to 21 U.S.C. § 848. *See Rutledge* 116 S.Ct. at 1248. Here, as in *Rutledge,* Yu was convicted of both a CCE offense and a conspiracy offense, and accordingly his conviction violates the *Rutledge* rule.

While direct review of *a Rutledge* violation would require a district court to vacate one of the defendant's convictions, *see id.* at 1250-51, the issue of whether a *Rutledge* violation is applicable to a motion pursuant to § 2255 is one of first impression in this circuit. Yu contends that *Rutledge* is one of "those procedures that . . . are implicit in the concept of ordered liberty" and therefore is an exception to the general rule that new rules of criminal procedure are not applicable retroactively to habeas petitions, *see Teague v. Lane,* 489 U.S. 288, 310-11 (1989) (noting two exceptions to general rule). The Government, on the other hand, contends that *Rutledge* does not merit exception status because, among other things, the net effect of

applying *Rutledge* would be to vacate one life sentence leaving another in place, and eliminating a $50 special assessment.

Both parties, however, fail to address the threshold issue of whether *Rutledge* announces a new rule of criminal procedure. Rutledge is substantive, not procedural, and therefore *Teague* does not apply. In *Rutledge,* the Supreme Court applied established precedent to frame what essentially was a statutory interpretation issue. Beginning with the proposition that "[c]ourts may not 'prescrib[e] greater punishment than the legislature intended' ", *id.* at 1245 (quoting *Missouri v. Hunter,* 459 U.S. 359, 366 (1983)), the Court held that, pursuant to *Ball v. United States,* 470 U.S. 856 (1985), dual convictions constitutes additional punishment. *See Rutledge,* 116 S.Ct. at 1247. The Court then invoked a statutory construction presumption that "where two statutory provisions proscribe the same offense, a legislature does not intend to impose two punishments for that offense." *Id.* at 1245 (citing *Whalen v. United States,* 445 U.S. 684, 691-92 (1980)) (internal quotations omitted). Applying the analysis established in *Blockberger v. United States,* 284 U.S. 299, 304 (1932), the Court concluded that a conspiracy offense is a lesser included crime of a CCE offense. *See Rutledge,* 116 S.Ct. at 1247. Finally, evaluating congressional intent, the Court found no reason to rebut this presumption, *id.* at 1249-50, and therefore held that dual conviction is precluded. Accordingly, since Yu was convicted of two substantive criminal laws in contravention of Congressional intent, *Teague* does not apply.

A change in substantive, non-constitutional law is applied retroactively to a defendant who was convicted under the previous law and then brought a section 2255 petition alleging his actual innocence in view of the intervening change in law. *See Triestman v. United States,* 124 F.3d 361, 367-68 (2d Cir.

1997); *Ianniello v. United States*, 10 F.3d 59, 62, 63 (2d Cir.1993) (citing *Davis v. United States*, 417 U.S. 333, 346-47 (1974) (holding that section 2255 is available even on nonconstitutional grounds if a new decision establishes that a prisoner was convicted "for an act that the law does not make criminal")). In *Triestman*, the Second Circuit addressed a section 2255 petition brought on grounds that petitioner was convicted based on an erroneous interpretation of a criminal statute, which error was made clear by an intervening Supreme Court decision. *Id.* at 364 (pursuant to Supreme Court decision in *Bailey v. United States*, 116 S.Ct. 501 1995), a defendant must "actively" employ the weapon to sustain a 18 U.S.C. 924(c) conviction). Here, too, Yu contends that he was convicted based on an erroneous interpretation of a statute made clear by an intervening Supreme Court ruling. Accordingly, *Rutledge* compels the conclusion that the conspiracy violation of 21 U.S.C. § 846 is an " 'unauthorized punishment for a separate offense' and must be vacated." *Rutledge*, 116 S.Ct. at 1250-51.

### III. *Yu's Claim that the Government Suppressed Favorable Evidence Must Fail*

The petitioner contends that the Government violated its *Brady* obligation to turn over favorable material evidence to the defendant. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See Kyles v. Whitley*, 115 S.Ct. 1555, 1566 (1995). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *United States v. Bagley*, 473 U.S 667, 682 (1985).

*Appendix C*

Yu alleges that Wong had told the Government that Davies had other Hong Kong suppliers. Yu further contends that the Government suppressed government agent reports which showed that Yu was not a supplier in the Texaco conspiracy. Yu contends this evidence was material since it would have impeached the credibility of Davies, upon which Yu's involvement with the Texaco conspiracy was largely based. Accordingly, Yu seeks an evidentiary hearing to discover the extent of Wong's impeachment material known to the Government, as well as discovery of the agent reports.

In reply, the Government does not deny that the reports and Wong's statements might have provided impeachment material, but rather it contends that even if Yu's allegations are true, relief is not warranted.

Given the totality of the evidence, there is no testimony by Wong that would undermine the confidence of the verdict, and therefore the request for an evidentiary hearing and the *Brady* claim are denied. According to the affidavit submitted by Yu's investigator in support of the instant motion, Wong stated that he told the Government that Davies had other suppliers in Hong Kong at the same time Davies was being supplied with heroin by Yu. This information, if provided by the Government to Yu, could have been used to impeach Davies testimony that Yu was his only supplier, raising a question of whether the heroin which was the subject of the Texaco conspiracy was provided by Yu. However, Wong stated in his 1990 affidavit to the Government that "I do not know the true story of where these 30 units came from." (Affidavit in Support of Request for Extradition By Tony Wong, May 11, 1990,

¶ 6). Therefore, Wong could not have dispositively exculpated Yu from involvement in the Texaco conspiracy.

Furthermore, Wong's credibility regarding his recent statements is undermined by his apparent self-interest. For example, Wong states he never delivered cocaine to Maine, he never supplied drugs to Davies, he never met Chan, and that he did not receive $500,000 as payment in 1991, and that Davies lied in his testimony. Accordingly, even if Wong did tell the Government that Davies had multiple suppliers and even if the Government was obligated to turn over the statements to Yu, the weakness of Wong's exculpatory evidence would not impair the credibility of Davies' testimony to the degree necessary to challenge the outcome of Yu's trial.[4]

Yu contends that the agent reports would show that the Government's confidential informant involved with the Texaco conspiracy indicated that the heroin was available for purchase as early as September, 1988. According to Yu, if the Government turned over these agent reports to Yu before trial, he could have used it to raise a reasonable doubt that the heroin sold by Wong and Davies was not provided by Yu. The heroin sold at the Texaco station could not have been from Yu's October 25, 1988, shipment, he reasons, if it was available in September. Furthermore, Yu contends that the agent reports contain statements by the confidential informant that the source was Canadian suppliers. Therefore this additional information, if available at trial, would have helped to impeach Davies'

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4. Yu's claim that the government suborned perjury is without merit. At best, even if Yu's contention that Wong told the Government Davies had several suppliers, the prosecutor had contradictory information. This does not amount to showing that Davies in fact lied, much less that the Government was aware of any perjury.

testimony that it was Yu who supplied the heroin. Yu therefore requests that the Court order disclosure of the agent reports to support the instant motion.

The information cited by Yu relating to the agent reports, however, is derived from transcripts from Wong's 1989 trial for the Texaco conspiracy. *See United States v. Figueroa,* No. 88 Cr. 859 (S.D.N.Y. 1989). The Second Circuit has held "*Brady* cannot be violated if the defendants had actual knowledge of the relevant information or if the documents are part of public records and 'defense counsel should know of them and fails to obtain them because of lack of diligence in his own investigation.' " *United States v. Zagari,* 111 F.3d 307, 320 (2d Cir. 1997) (quoting *United States v. Payne,* 63 F.3d 1200, 1209 (2d Cir. 1995)), *cert. denied sub. nom. Herzog v. United States,* 118 S.Ct. 445 (1997). *See, e.g., United States v. Bermudez,* 526 F. 2d 89, 100 (2d Cir. 1975) (state's investigative files were not suppressed since defense counsel, who represented one of the defendants in the state proceedings, could have discovered them "with the exercise of due diligence"). If the document is not known to defendant or reasonably discoverable, however, even if it is in the public domain, failure to disclose violates *Brady.* In *United States v. Payne,* 63 F.3d 1200 (2d Cir. 1995), the Second Circuit held that the government's failure to produce an affidavit violated *Brady.* The court concluded that the government knew of the affidavit, the affidavit contained evidence favorable to the defendant's defense, there was no indication that defendant's counsel was aware of facts that would have required him to discover the affidavit through his own diligent investigation on behalf of his client, and the government produced large volumes of material concerning the affiant upon which he "could reasonably assume that the court files did not include other

undisclosed exculpatory and impeachment documents." *Id.* at 1209.

Here, the evidence cited by Yu was in the publicly available trial transcript three years before Yu's trial. If Yu believed that he did not provide the drugs implicated in the Texaco case, then reasonable due diligence would have discovered it. Therefore the Government did not violate *Brady* by failing to draw defense counsel's attention to possibly exculpatory information which was in the public record.

Furthermore, Yu has not demonstrated that the information requested is so material as to require a new trial. The heroin dealing at the Texaco station was apparently an on-going activity. Even if the Government investigation did reveal information that heroin was available earlier than Yu's October shipment, and even if there was a Canadian source for heroin being dealt at the Texaco station, those facts fail to establish that the two kilograms of heroin sold by Davies and Wong on that particular day were not provided by Yu. *See United States v. Reyes*, 49 F.3d 63, 68 (2d Cir. 1995) ("New evidence that is merely impeaching will not ordinarily justify a new trial."); *United States v. Aguillar*, 387 F.2d 625, 626 (2d Cir. 1967) ("The discovery of new evidence which merely discredits a government witness and does not directly contradict the government's case ordinarily does not justify the grant of a new trial.").

## IV. *Yu's Claim That The Trial Court Improperly Instructed The Jury Must Fail*

Yu contends that the Court erred its jury instructions by (1) failing to give a lesser included offense instruction in the

jury charge; (2) misconstruing the predicate acts necessary to fulfill the series of violations required under the CCE statute; and (3) not instructing the jury that it had to be unanimous as to the predicates of the CCE charge.

### A. It Was Not Error To Omit A Lesser Included Offense Jury Instruction

A court does not commit error when it omits a lesser included offense instruction if trial counsel did not request one. *See United States v. Seijo*, 537 F.2d 694, 698-99 (2d Cir. 1976). Here, trial counsel did not request a lesser included offense instruction.[5] Thus, no violation occurred and the omission did not prejudice Yu as a matter of law.

Even if, as Yu asserts, failure of trial counsel to request this instruction and appellate counsel's failure to raise the issue on direct appeal constituted ineffective assistance, Yu has not shown that the lack of a lesser included instruction resulted in prejudice. In order to show prejudice, this Court must decide whether the instructions, "taken as a whole and viewed in the light of the evidence, show no tendency to confuse or mislead the jury as to principles of law which are applicable." *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359, 362-63 (2d Cir. 1966). Yu claims that the conspiracy and CCE crimes are similar, although they carry different penalties. The similarity, according to Yu, may have resulted in jury confusion such that they may have believed that if there was no reasonable doubt that Yu was guilty of

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5. To the extent failure to request this instruction might raise the issue of ineffective assistance of trial counsel, such a claim is barred by the previous appeal of this issue.

conspiracy, then he was guilty of the CCE offense too. A lesser included offense instruction, according to Yu, would have served to distinguish the two crimes for the jurors, noting that the CCE crime contains additional elements, each of which must be found beyond a reasonable doubt to convict Yu of the greater crime. However, Yu provides no analysis of the actual jury instruction here to indicate that it was confusing to the jurors. Yu provides no concrete reason to believe that any juror did not accurately understand the Court's different instruction on the elements of each offense, and Yu's claim must therefore be denied.

### B. The Unanimous Verdict and Predicate Act Claims Are Barred

Yu claims that the court failed to properly instruct the jury concerning (1) the requirement to find each act constituting the continuing series for the CCE unanimously, and (2) which predicate acts are legally sufficient to find a CCE. Because Yu failed to raise them on direct appeal, these claims are procedurally barred.

Where a defendant has failed to raise an issue on direct appeal, a claim will be barred under § 2255 unless the defendant establishes cause for his failure to raise the issue and demonstrates that he would be subject to actual prejudice. *See Wainwright v. Sykes,* 433 U.S. 72, 84 (1977). Although " 'cause" and "prejudice" cannot be delineated with precision, the Supreme Court provided guidance by concluding that " 'cause" must be something external to the petitioner, something that cannot be fairly attributed to him." *Coleman v. Thompson,* 501 U.S. 722, 753 (1991). The Supreme Court has held that the "prejudice" must be so substantial that the integrity of the entire proceeding is infected. *See United States v. Frady,* 456 U.S. 152, 169-70 (1982).

*Appendix C*

Yu does not even attempt to establish cause for not raising these claims on direct appeal. Consequently, his claims must be denied. *See Narvaez v. United States,* No. 93 Civ. 5855, 1993 WL 535066, *2 (S.D.N.Y. Dec 21, 1993) (where cause is not stated by the petitioner regarding why the claim was not brought on appeal, the claim will be denied).

**V. *Yu's Claim of Prosecutorial Misconduct On Cross Examination Fails***

Yu contends that the failure to raise this issue on appeal was the result of ineffective assistance of counsel, thereby attempting to bypass the "cause" prong of the procedural bar to raising new claims in a section 2255 motion. However, even if ineffective assistance did constitute cause in this case, Yu does not satisfy the actual prejudice prong.

Yu contends that the prosecutor unfairly incriminated him on the stand by engaging in a line of questioning that repeatedly and improperly introduced testimony by the prosecutor which implied Yu did business with a known drug dealer, Chung Sui Chuen ("Chuen"). Yu contends this prejudiced the jury, since his denial of any knowledge of or involvement with Chuen was distorted by the Government.

However, upon objection by the defense counsel that the prosecutor was testifying, the prosecutor explained she had a "good-faith" basis for the questions and the defense objection was overruled. Moreover, the prosecutor did elicit an admission that Yu had Chuen's beeper number in his phone book. Thus, the prosecutor's questions were not improper and did not unfairly prejudice Yu.

Additionally, upon a request by defense counsel, this Court instructed the jury that the beliefs of counsel are to be disregarded and that only the witness's answers can be relied on as evidence. Such instructions can cure an error unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions and a strong likelihood that the effect of the evidence would be "devastating" to the defendant. *See United States v. Castano,* 999 F.2d 615, 618 (2d Cir. 1993) (where the court orders the jury to disregard evidence, it is presumed the jury will follow the instruction). Here, there is no reason to believe that the jury could not follow this instruction, nor that it would have a devastating effect on the defendant. Accordingly, even if it was error to permit the Government's inquiry, the error was cured by the jury instruction.

## VI. *Yu's Claims Of Prosecutorial Misconduct During the Trial Summation Fail*

### A. Yu's Claim That The Government Improperly Vouched For the Credibility Of Its Witnesses Was Litigated On Direct Appeal, And Is Procedurally Barred

A section 2255 petitioner cannot relitigate questions which were raised and considered on direct appeal. *See Barton v. United States,* 791 F.2d 265, 266-67 (2d Cir. 1986) (per curiam); *Giacalone v. United States,* 739 F.2d 40, 42 (2d Cir. 1984) ("It is well settled that a § 2255 motion to vacate [sic] sentence 'cannot . . . be employed to relitigate questions which were raised and considered on the appeal.' ") (quoting *Castellana v. United States,* 378 F.2d 231, 233 (2d Cir. 1967)).

Yu's contention that the prosecutor vouched for the credibility of witnesses at trial was decided on direct appeal.

*See United States v. Yu*, No. 93-1882, at 2 (2d Cir. Sept. 20, 1994). The Court concluded that the Government's remarks that their witnesses "answered each question truthfully" was not vouching, but rather, arguing to the jury from the circumstances. *Id.* at 3. Thus, this issue is procedurally barred.

### B. Yu's Claim That The Government improperly appealed to the passions of the jury during summation Is Barred

Yu similarly invokes as the "cause" of his failure to raise this claim on direct appeal the ineffective assistance of appellate counsel, and here too his claim is barred because he fails to show prejudice.

A prosecutor's statements amount to prosecutorial misconduct if the "remarks were so prejudicial that they rendered the trial in question fundamentally unfair." *Garofolo v. Coomb*, 804 F.2d 201, 206 (2d Cir. 1986). *See also Donnelly v. DeChristoforo* 416 U.S. 637, 645 (1974). The Second Circuit has applied a three factor test in determining the existence of "substantial prejudice" where a prosecutor's summation is challenged; (1) "the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the certainty of conviction absent the improper statements." *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981) (per curiam).

A broad range of rhetorical comments are allowed in closing arguments. *See Harper v. Kelly*, 704 F. Supp. 375, 379 (S.D.N.Y. 1989) (criticizing the defense as a "shotgun defense" and of using "red herrings" did not prejudice defendant); *see also United States v. Marrale*, 695 F.2d 658, 666 n.9 (2d Cir. 1982) (characterization of defense as "woven out of the thread

of desperation and thread that unravel [sic] before you" did not deprive the defendant of a fair trial); *United States v. Peterson*, 808 F.2d 969, 977 (2d Cir. 1987) (reference to witness's rap sheet as "longer than the jury rail" was not improper). Accordingly, Yu's claim that the prosecutor improperly appealed to the passions of the jury by stating that Yu supplied "goods that destroyed countless lives in New York" and that the defendant "made everyone's life a living nightmare" were not improper. Therefore, Yu has not showed prejudice and the claim is barred.

**C. The prosecutor's reference to herself as a Government representative was not improper.**

Similarly, the prosecutor's reference to herself as a representative of the Government did not amount to prosecutorial misconduct. In summation, the Government state: "And now, at the end of the case, as a representative of the United States Government, I submit to you, the jury, that the trial, the evidence at this trial, the testimony of the witnesses, the physical proof, the stipulations, all of the evidence that's been presented at this trial has established the defendant's guilt beyond a reasonable doubt." *See* Tr. at 1196.

Yu's reliance on *Floyd v. Meachum*, 907 F.2d 347 (2d Cir. 1990), is misplaced. In *Floyd*, the Second Circuit held it was improper for a prosecutor to personally "vouch" for witnesses, or to express her personal belief in the defendant's guilt because it invites the jury to "view its verdict as a vindication of the prosecutor's integrity rather than as an assessment of guilt or innocence based upon the evidence presented at trial." *Id.* at 354. *Floyd*, however, addressed a situation in which the prosecutor interjected her personal beliefs concerning the credibility of

witnesses. *Id.* Moreover, the Court emphasized it's decision to grant a new trial to the stemmed from the "cumulative effect of the three alleged categories of improper remarks," and the fact that "this case does not involve one, or a few isolated, brief episodes; rather, it involves repeated and escalating prosecutorial misconduct from initial to closing summation." *Id.* at 353. There was no issue as to whether it is improper for a prosecutor to identify herself as a representative of the government.

Even assuming the remark is error, however, it does not amount to prejudice under the *Modica* standard. The comment was brief and superficial, the harm or prejudicial impact of the comments in light of the totality of the evidence presented at trial is insignificant, and there was no objection made nor any curative instruction sought by trial counsel. *See Modica,* 663 F.2d at 1181. Thus, Yu's claim that the prosecutor improperly alluded to herself as a representative of the United States during summation did not result in substantial prejudice and is procedurally barred.

***Conclusion***

For the reasons set forth above, Yu's claim that his dual conviction for conspiracy and participating in a Continuing Criminal Enterprise crime violated the Supreme Court rule in *Rutledge v. United States,* 116 S.Ct. 1241, 1248 (1996) is granted, and therefore the conspiracy conviction is vacated. The motion is denied in all other respects.

It is so ordered.

New York, N.Y.
April 6, 1998

s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

## APPENDIX D — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JULY 25, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

**THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.**

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of July, one thousand nine hundred and ninety-six.

Present: HONORABLE RALPH K. WINTER,
HONORABLE PIERRE N. LEVAL,
HONORABLE JOSÉ A. CABRANES

*Circuit Judges.*

*Appendix D*

No. 95-2760

KWOK CHING YU,

*Petitioner-Appellant,*

- v. -

UNITED STATES OF AMERICA,

*Respondent-Appellee.*

* * *

Appeal from the United States District Court for the Southern District of New York (Sweet, *Judge*)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby affirmed.

Kwok Ching Yu appeals from Judge Sweet's denial of his motion for a new trial based on newly discovered evidence under Rule 33 of the Federal Rules of Criminal Procedure. We affirm for substantially the reasons stated by the district court in its Memorandum Order filed October 25, 1995. *United States v. Yu,* 902 F. Supp. 464 (S.D.N.Y. 1995).

*Appendix D*

s/ Hon. Ralph K. Winter, U.S.C.J.
Hon. Ralph K. Wither, U.S.C.J.

s/ Hon. Pierre N. Leval, U.S.C.J.
Hon. Pierre N. Leval U.S.C.J.

s/ José A. Cabranes, U.S.C.J.
José A. Cabranes, U.S.C.J.

## APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK DATED OCTOBER 25, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Cr. 47 (RWS)

UNITED STATES OF AMERICA,

- against -

KWOK CHING YU,

Defendant.

OPINION

* * *

**Sweet, D.J.**

Defendant Kwok Ching-Yu ("Yu") has moved pursuant to Rule 33, Fed. R. Crim. P. for an order granting him a new trial. For the following reasons, the motion is denied.

*Procedural and Factual Background*

Following a second jury trial[1], petitioner Yu was convicted on December 15, 1992 for, among other counts, possession with intent to distribute two kilograms of heroin seized by DEA

1. A first trial commenced on April 6, 1992 and concluded on April 23, 1992, when a mistrial was declared after the jury reported that it was deadlocked on the third day of deliberations.

agents at a Texaco gasoline narcotics bust on November 8, 1988 (the "Texaco count"). Yu was found guilty of two counts of conspiracy to import into the United States and to distribute more than one kilogram of heroin in violation of 21 U.S.C. §§ 846 and 963; of being a principal administrator of a continuing criminal enterprise in violation of 21 U.S.C. §§ 848(a) and (b) ; of two counts of importing heroin into the Unites States in violation of 21 U.S.C. §§ 812, 952, 960(a)(1), 960(b)(1)(A) and 18 U.S.C. § 2; and of possession of heroin with intent to distribute in violation of 21 § 812, 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2. The Count at issue here is count seven from the initial indictment, the Texaco count.

During the trial, both at the close of the Government's case and again at the end of the trial, Yu moved pursuant to Fed. R. Crim. P. 29 for acquittal on the Texaco count due to insufficiency of the evidence connecting Yu to the heroin seized at the Texaco station. Both motions were denied.

The evidence at trial regarding the Texaco heroin was provided through testimony of Davies Yu ("Davies") and a DEA agent. It was established that Yu recruited Davies and Simon Lai to transport Yu's heroin from Hong Kong to New York. The Texaco station incident occurred on November 8, 1988 when Davies and Tony Wong ("Wong" or "Tony") were arrested at the scene of a narcotics bust on Seventh Avenue in Manhattan where several kilograms of heroin were confiscated. The Government alleged that the heroin sold by Wong at the Texaco station was part of the scheme that involved Yu. The Government alleged that Yu supplied the heroin to Wong, through Davies, that was involved in the Texaco count. With regard to the heroin from Yu for Wong, Davies testified as follows:

*Appendix E*

Q: Around when was that?

A: Around the beginning of November [1988].

Q: Did Tony tell you how much heroin he wanted.

A: He wanted . . . ten to fifteen [units] . . .

* * *

Q: And when Tony told you this, what did you tell him?

A: I said I will ask for him.

Q: Did you tell him who you would ask?

A: I don't remember if I told him I would ask [Yu]. . . . [After this conversation with Tony] I called [Yu] . . . I told him that Tony wanted about ten units or so. . . . He said he will think and if he had any he would call me.

Q: Did there come a time when the defendant called you?

A: Yes. . . . He said he will give me 20. But when we go get it, it will be more than 20. But the rest he wanted me to drive down to Chinatown for him. . . . [We drove to] Queens Boulevard. . . . He said the car was parked across the street. He said that there are two boxes of merchandise in the trunk. . . . And then I got into the car and drove the car back to Manhattan. . . . I

first stopped at 28th Street. . . . Tony was waiting for me there. . . . I asked him — asked Tony to take one box away. . . . After I parked I called [Yu]. . . . And then I arranged for [Yu] to come down to Chinatown and give him back the car key. . . .

Q: After you returned the car to the defendant, what did you do?

A: And then I went back to 28th Street.

Q: When you got back to your apartment at 28th Street, who was there?

A: Tony Wong. He said he was contacting the clients to sell things to them. . . .

Q: Directing your attention to November 8th of 1988 . . . where was the heroin that you had delivered to Tony after getting it from the defendant?

A: It was still in my closet. . . . [e]xcept for the ones that Tony had sold. . . .

Q: What happened on the evening of November 8th of 1988?

A: Tony Wong and I were arrested. . . . That night Tony, his girlfriend came up to our apartment to pick us up, my girlfriend had not changed yet. And Tony hurt his eye that day so he couldn't drive. He said he wanted to go down to 7th Avenue. Originally

his girlfriend was going to drive him down. I said, Why don't we just let the girls stay. I said I would drive him down.

Q: At the time that you agreed to drive Tony down to the [Texaco] gas station, did you know what he was going to do at the gas station?

A: No. He just said I will drive him down there for a few minutes.

Q: Did you drive Tony Wong down to the gas station?

A: Yes. . . . Tony got off. He asked me to park aside and wait for him, he will be very quick. . . . As soon as I saw several people push Tony down on the ground and then several guns pointed at me.

Earlier in the trial, the government put agent Nargi on the stand. In describing his observations at the Texaco station on November 8, he stated:

A: After we made the arrests, the phone at the gas station continued to ring, and we had the confidential informant answering the phone. After the informant had a conversation on the phone, we talked to the informant, and after talking to the informant, we established surveillance in and around the outside of the gas station in anticipation of the informant meeting someone that was coming to the gas station.

*Appendix E*

> Q: Now, while you were conducting this second surveillance on November 8, 1988, what did you observe?
>
> A: We — I observed an oriental male [, Tony Wong,] come to the gas station and meet with the informant, converse with the informant for a period of time, go to the informant's trunk, look in the trunk in a bag, and shortly after that we placed [Tony Wong] under arrest.
>
> . . . [In May of 1989] [a] number of those people [from the Texaco station], including Tony Wong were convicted.

Davies testified that the heroin he had received from the defendant was all in the closet except for that which had been sold by Wong. He added that there was money in the closet for all the sold heroin. At the appellate argument, counsel for Yu argued that because all of the heroin that Yu had supplied was accounted for, the money that Wong was going to pick up, must be for heroin not supplied by Yu and that there was no nexus between Yu and the heroin at the Texaco station. In affirming the conviction, the Court of Appeals rejected this argument.

Because the conspiracy of which he was convicted involved 231 kilograms of heroin, pursuant to 21 U.S.C. § 848 a sentence of life imprisonment was required, in addition to five years of supervised release. This sentence was imposed at a sentencing hearing on December 3, 1993.

The conviction was appealed to the Court of Appeals on grounds including insufficient evidence convicting Yu with the

transaction at the Texaco station. Following oral argument on September 19, 1994, the Court of Appeals affirmed his conviction in all respects on September 20, 1994.

The Court of Appeals also denied Yu's ineffective assistance of counsel claim, holding that trial counsel did request a missing witness charge that the Court properly denied because Tony Wong was available to be called by the defense, if they so chose. The Court of Appeals also found that Tony Wong "the witness whom the defendant claims should have been called by his counsel had previously submitted an affidavit which indicated that he was likely to inculpate the defendant. Defendant's counsel was surely justified in not calling him."

On December 21, 1994, the Court of Appeals denied petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc.

This motion to set aside judgment and for a new trial was filed on June 21, 1995. Oral argument was heard on August 23, 1995 at which time the motion was considered fully submitted.

*Discussion*

Yu asserts that information discovered only at oral argument before the Court of Appeals, entitles him to new trial. The "newly discovered evidence" on which Yu bases his motion consists of the Assistant U.S. Attorney's statement at the appellate argument that Wong's testimony at trial would have added nothing to the evidence provided by the Government at trial: "The link is all there, Davies Yu provides the link in his testimony. I think the focus has been on page 206 and 207 [of the trial transcript], but if you go to page 200 and a few pages

beyond 207, you will see that the complete link is there. So Tony Wong would not have added more to that."

Motions for a new trial based on newly discovered evidence are not favored and should be granted only with great caution, and in "the most extraordinary of circumstances." *United States v. Spencer*, 4 F.3d 115, 118 (2d Cir. 1993) (quoting *United States v. Imran*, 964 F.2d 1313, 1318 (2d Cir.) (in turn quoting *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987)), *cert. denied*, 113 S.Ct. 1953 (1993); *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied*, 429 U.S. 819, 97 S.Ct. 65, 66, 50 L.Ed.2d 80 (1976). To obtain a new trial based on newly discovered evidence, the defendant must show (1) that the evidence is truly newly discovered, i.e., discovered after trial; (2) that it could not, with due diligence, have been discovered prior to or during trial; (3) that the evidence is material and not cumulative or impeaching, and (4) that the evidence would probably lead to acquittal. *United States v. Underwood*, 932 F.2d 1049, 1052 (2d Cir.), *cert. denied*, 502 U.S. 942, 112 S-Ct. 382, 116 L.Ed.2d 333 (1991); *United States v. Diaz*, 922 F.2d 998, 1006-07 (2d Cir. 1990) ("new" evidence must create "a reasonable doubt that did not otherwise exist"), *cert. denied*, 500 U.S. 925, 111 S.Ct. 2035, 114 L.Ed. 2d 119 (1991); *United States v. Tutino*, 883 F.2d 1125, 1140 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 & 1082, 110 S.Ct. 1139, 107 L.Ed.2d 1044 (1990); *DiPaolo*, 835 F.2d at 49; *United States v. Gilbert*, 668 F.2d. 94, 96 (2d Cir. 1981), *cert. denied*, 45.6 U.S. 946, 102 S.Ct. 2014, 72 L.Ed.2d 469 (1982); *United States v. Alessi*, 638 F.2d 466, 479 (2d Cir. 1980); *United States v. Castano*, 756 F.Supp. 820, 823 (S.D.N.Y. 1991).

Thus where a defendant had before the trial the very information he claims is new evidence, he is not entitled to a new

trial. *See United States v. Slutsky,* 514 F.2d 1222, 1225 (2d Cir. 1975). Yu must demonstrate that the "new" evidence could not have been discovered through due diligence before or during the trial. *United States v. Siddigi,* 959 F.2d 1167, 1173 (2d Cir. 1992).

The "new evidence" offered by Yu, focusses on the prosecutor's admission that Wong's testimony would have added nothing new, that it would have been cumulative. The strongest case that Yu can make is that the conviction was based on an impermissible inference that Wong would have provided a stronger link between the heroin and Yu. But the sufficiency of the evidence in the absence of Wong's testimony has been tested at four points in the life of this case: in the denial of two Rule 29 motions by the jury in convicting Yu on the Texaco count and by the Court of Appeals in affirming the conviction. Confirmation that Wong has nothing more to offer does not effect the strength of the underlying factual record. Furthermore, there is no assertion that Wong would testify or what he would be likely to say that would address the connection between Yu and the heroin seized at the Texaco station.

This new evidence also fails to meet the requirements for invoking the exception on several fronts.

First, the potential testimony is not "newly discovered." A number of courts have held that the testimony of a co-defendant who chose not to testify at the trial or who previously asserted his right against self-incrimination is not newly discovered evidence. *United States v. Persinger,* 587 F.Supp. 899, 901 (W.D.Pa.1984); *see, e.g., United States v. Jacobs,* 475 F.2d 2701 286 (2d Cir.), *cert. denied sub nom., Lavelle v. United States,* 414 U.S. 821, 94 S.Ct. 116, 38 L.Ed. 2d 53 (1973); *Castano,* 756 F.Supp. at 823 (citing cases).

*Appendix E*

At the time of trial, Yu knew that Wong was an alleged co-conspirator. Thus, Yu knew that he may have "possessed relevant information which could exonerate him" if he might have testified that he did not deliver the heroin seized by the DEA agent at the Texaco station or perhaps that Yu had not supplied the heroin. *See Castano,* 756 F.Supp. at 823. Given the circumstances, the potential testimony of Wong "can at best be characterized as 'newly available' I which is not 'synonymous with newly discovered evidence on a Rule 33 motion.' " *Id.* at 823-24 (quoting *United States v. DiBernardo,* 880 F.2d 1216, 1225 (11th Cir.1989)).

Concededly, Yu did not know exactly what Wong would say on the stand. Nevertheless, as the Court of Appeals for the Fifth Circuit has written:

> The precise testimony of any potential witness cannot be known until it is had . . . The decision not to interview [the witnesses], and not to call either witness, whether wise or not, was a deliberate and strategic one. The defendant is not entitled to a new trial so that he may employ a different strategy. Because the proffered testimony was readily available at the time of trial, there is no newly discovered evidence within the meaning of Rule 33.

*United States v. Beasley,* 582 F.2d 337, 339 (5th Cir. 1978); *see also United States ex rel. Regina v. LaVallee,* 504 F.2d 580, 583 (2d Cir.1974) (defendant may not obtain new trial on basis of "new evidence" in form of testimony of witness available but not called at trial), *cert. denied,* 420 U.S. 947, 95 S.Ct. 1330, 43 L.Ed.2d 425 (1975).

For these reasons, Wong's testimony or the admission that it would not strengthen the nexus between Yu and the Texaco heroin, which Yu claims would have cleared the record that there was no connection between Yu and the heroin cannot be considered newly discovered evidence simply because Yu chose not to call Wong because he "didn't know what he would say."

Moreover, Yu has failed to establish that he could not with due diligence have discovered this evidence prior to trial. In light of this Court's denial of a missing witness charge on the grounds that efforts had not been made to subpoena Wong, and the Court of Appeal's affirmance of same, Yu has produced no evidence of any attempts to subpoena Wong before or during trial, *see United States v. Cruz*, 602 F.Supp. 825, 833 (S.D.N.Y.1985), or to request that the Government grant them immunity. *Castano*, 756 F.Supp. at 824 *(citing Cruz*, 602 F.Supp. at 830); *United States v. La Duca*, 447 F.Supp. 779, 786-88 (D.N.J.), *aff'd*, 587 F.2d 144 (3d Cir 1978), *cert. denied*, 440 U.S. 972, 99 S.Ct. 1537, 59 L.Ed.2d 789 (1979).

Finally, contrary to his claim that the fact that Wong could not add anything to the case, supports Yu's theory of no nexus, it simply adds nothing to the record. Between Davies' testimony and that of agent Nārgas, it is possible that the jury could have found conspirator liability on the part of Yu for the sale at the Texaco station. The charge allowing such a finding was given.

It is not clear that the absence of a more concrete connection by Wong would "probably lead to acquittal." The potential testimony of Wong or a stipulation that Wong presents no stronger testimony on the nexus between Yu and the Texaco heroin, does not compromise the evidence adduced at trial: that DEA agents arrested Wong at the Texaco station

contemporaneous with the seizure of narcotics; that the agent testified that Wong had gone into the car where the bag was; that Davies had picked up heroin from Yu and delivered it to Wong; and that Yu may have told Wong that the defendant was the potential source of the heroin. Yu maintains, nevertheless, that the fact of the government's admission that Wong would have added nothing more undermines the jury's crucial inference from the Davies Yu testimony, that the heroin given from the defendant to Davies Yu and from Davies Yu to Wong was the same heroin involved at the Texaco gas station. While the connection may be tangential and based on inference, the jury found it sufficient to link Yu to the Texaco count through his co-conspirator liability. It is not logical, however, that the additional fact that Wong could not have added more, would create the necessary element that this fact would "probably" lead to acquittal.

The Government did not rest its case on the fact that Wong knew who the original supplier of the heroin was. It is not critical to the Government's case that Wong could not identify the heroin at the Texaco station as Yu's. It appears from the extradition affidavit that Wong might state definitively that the heroin involved at the Texaco station was that which he had obtained from Davies. Since Yu has no case stronger than the Government's statement that Wong's testimony was unnecessary and cumulative, the petition must be dismissed.

*Appendix E*

*Conclusion*

For the foregoing reasons, Yu's motion for a new trial is denied.

It is so ordered.

s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

New York, N. Y.
October 25, 1995

## APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED SEPTEMBER 20, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of September, one thousand nine hundred and ninety-four.

Present:

Honorable George C. Pratt
Honorable Pierre N. Leval
Honorable Guido Calabresi
*Circuit Judges.*

# 93-1882

UNITED STATES OF AMERICA,

*Appellee,*

v.

KWOK CHING YU, a/k/a "Mon Lop Yu," a/k/a "Fou Tse Tau," a/k/a/ "Bald-headed Guy,"

*Defendant-Appellant.*

**ORDER**

Appeal from the United States District Court for the Southern District of New York (Robert W. Sweet, *Judge).*

*Appendix F*

This cause came on to be heard on the transcript of record from the United States District Court and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the ruling of the district court is affirmed.

Kwok Ching Yu was charged with conspiracy to distribute heroin, conspiracy to import heroin, distributing heroin on two separate occasions, importing heroin during two separate periods of time, and conducting a continuing criminal enterprise (CCE) of which he was the principal administrator.

Following an eleven-day jury trial before Judge Sweet and a jury, the defendant was convicted on all counts on which he was charged. None of his numerous claims on appeal have merit.

The defendant contends that Judge Sweet committed reversible error because he did not instruct the jury that it should not consider the guilty pleas of the government's witnesses as evidence of the defendant's guilt. *United States v. Ramirez*, 973 F.2d 102, 105 (2d Cir. 1992). The defendant, however, neither requested such a charge at trial nor objected to the failure to give it. Because this omission did not constitute "plain error" within the meaning of Fed. R. Cr. P. 52(b), and because the evidence against the defendant was overwhelming, we decline to reverse on this ground.

The defendant claims that the government impermissibly bolstered and vouched for its witnesses on summation. Most of the examples cited do not merit discussion. As to the prosecutor's statement to the jury that the government's witnesses "answered each question truthfully" and that "Ah

Man [a government witness] was being truthful," it was clear in the context that this was not vouching, but arguing to the jury from the circumstances.

Under our precedents, defendants who assert that a prosecutor's remarks warrant reversal "face a heavy burden, because the misconduct alleged must be so severe and so significant as to result in the denial of their right to a fair trial." *United States v. Locascio,* 6 F.3d 924, 945 (2d Cir. 1993), *cert. denied,* 114 S. Ct. 1645 (1994). Additionally, because the defendant did not object at trial to any of these statements, reversal is in order only if the statements constitute plain error. Reviewing these remarks in the context of the trial as a whole, *Strouse v. Leonardo,* 928 F.2d 548, 557 (2d Cir. 1991), reversal is not warranted.

Defendant next claims that the performance of his counsel did not meet the standards of *Strickland v. Washington,* 466 U.S. 668 (1984). *Inter alia,* he complains of counsel's failure to object to the admission of certain testimony and to request a charge allowing an inference against the government by reason of its failure to call Tony Wong as a witness. As an initial matter, we note that the defendant's trial attorney did request a missing witness charge. Judge Sweet declined to so charge the jury because Tony Wong was available to be called by the defense, if it chose. The other aspects of the claim of ineffective assistance are also without merit. The witness whom the defendant claims should have been called by his counsel had previously submitted an affidavit which indicated that he was likely to inculpate the defendant. Defendant's counsel was surely justified in not calling him. As to the defendant's claim that his attorney should have moved to have certain hearsay evidence excluded, the evidence was admissible as the

statement of co-conspirator under Fed. R. Evid. 801(d)(2)(E). Counsel is not required to make frivolous objections. *See, e.g., United States v. Boothe*, 994 F.2d 63, 69 (2d Cir. 1993).

Defendant contends that his conviction for the sale of heroin and cocaine at the Greenwich Village Texaco gasoline station must be reversed because there was not sufficient evidence connecting him with this transaction. He also claims that the evidence was insufficient to convict him, under Count 5 of the original indictment, as the principal administrator of a CCE.

The defendant has not met the extremely heavy burden he bears in raising sufficiency challenges. In this context, the evidence must be viewed in the light most favorable to the government, and every inference must be drawn in its favor. If the evidence thus construed could convince a rational trier of fact of the defendant's guilt, the jury's verdict must stand. *See, e.g., United States v. Sureff*, 15 F.3d 225, 228 (2d Cir. 1994). The evidence was sufficient.

The final issue the defendant raises on appeal is that his mandatory life sentence imposed under 21 U.S.C. § 848(b) as a drug kingpin violated the Due Process clause of the Constitution and constitutes cruel and unusual punishment under the Eighth Amendment. As to cruel and unusual punishment, both the Supreme Court and this court have rejected Eight Amendment challenges to mandatory life imprisonment for those whose drug offenses were less serious than the defendant's. *Harmelin v. Michigan*, 501 U.S. 957 (1991) (mandatory life for first time offender convicted of possessing 672 grams of cocaine); *United States v. Valdez*, 16 F.3d 1324, 1334 (2d Cir. 1994) (rejecting Eighth Amendment

challenge to life sentences for "merely middle level drug dealers"). Due process challenges to mandatory minimum narcotics sentences have also been rejected by the courts. *See Chapman v. United States,* 500 U.S. 453 (1991); *United States v. Hammer,* 3 F.3d 266, 269 (8th Cir. 1993), *cert. denied,* 114 S. Ct. 1121 (1994) (rejecting due process attack on mandatory life sentence under §848(b)).

We have considered the defendant's remaining claims and they are without merit. His convictions are affirmed.

s/ Hon. George C. Pratt, U.S.C.J.
Hon. George C. Pratt, U.S.C.J.

s/ Hon. Pierre N. Leval, U.S.C.J.
Hon. Pierre N. Leval, U.S.C.J.

s/ Hon Guido Calabresi, U.S.C.J.
Hon Guido Calabresi, U.S.C.J.